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The Public Trust Doctrine: What a Tall Tale They Tell

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THE PUBLIC TRUST DOCTRINE: WHAT A TALL TALE THEY TELL

HOPE M. BABCOCK*

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I. INTRODUCTION

Despite continuing hostility towards the public trust doctrine because of its potential to defeat private property rights and the will of elected representatives,¹ the doctrine refuses to die.² It continues to assure public access to and protection of certain natural resources of communal value; in fact, the doctrine's geographic

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1. See, e.g., William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 402–03 (1997) (“Such expansion [of the public trust doctrine] only exacerbates what [some] commentators consider to be problems associated with the public trust doctrine, such as its undemocratic nature, the latitude it gives for technically noncompetent courts to second-guess administrative decisions on highly complex matters, and the danger the courts will overvalue public trust uses at the expense of private property rights.” (footnotes omitted)); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 *passim* (1989) [hereinafter Huffman, *A Fish Out of Water*] (criticizing the public trust doctrine's expansion); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 8–9 (2007) [hereinafter Huffman, *Inconvenient Truths*] (debunking the predominant historical account of the public trust doctrine's origins and noting the need to find another justification for a doctrine that defeats private property expectations and the choices of elected representatives); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 631–33 (1986) (questioning whether the public trust doctrine could supply a comprehensive approach to natural resource management and stating that the doctrine has no further place in an era of environmental protection laws).

2. For a sense of the vitality and complexity of the modern public trust doctrine, see Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1 (2007).

reach and the activities it protects have expanded beyond its original conception.³ It is this doctrinal accretion that has drawn the attention of Professor James Huffman, who in a recent article criticizes the “ambitions” of public trust scholars who see in “an *expansive* public trust doctrine . . . a powerful tool for the protection and preservation of natural resources and the environment” because, among other failings, they rely on a “mythological history of the doctrine.”⁴ This Essay is intended as a response to Professor Huffman’s critique.

Professor Huffman’s critical assessment of the alleged mythological history of the public trust doctrine is beside the point.⁵ Indeed, as he suggests, he is “tilting at windmills in trying to set the story straight.”⁶ The story he criticizes has become a “fact” in the minds of judges who use it to justify a particular application of the doctrine.⁷ Retelling the story to prevent future applications of the doctrine could destabilize property law, which has embraced the doctrine for centuries.⁸ Even if the doctrine is a myth invented by legal scholars and judges, the legal fiction doctrine, which Professor Huffman’s argument implicates,⁹ justifies it. Indeed, this Essay argues that the public trust doctrine is a good legal fiction because it enables new uses of the doctrine to perform a gap-filling function in the absence of positive law and, therefore, that it deserves to continue unchallenged.

Because much has been written on the topic of the public trust doctrine,¹⁰ Part II of the Essay very briefly describes the doctrine’s origins, its major

3. See Huffman, *Inconvenient Truths*, *supra* note 1, at 6–7.

4. *Id.* at 1 (emphasis added). Huffman is not the only legal scholar critical of the public trust doctrine’s provenance. See, e.g., James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. COLO. L. REV. 331, 364–66 (1998) (finding only partially true the assertion that the English Crown could not alienate lands under navigable water and that because the American colonies inherited the power of Parliament and the King as their successor, the colonies could convey land under navigable waters and extinguish any right of public passage).

5. For purposes of this Essay, I am not challenging any of Professor Huffman’s historical support for his argument and, indeed, am perfectly willing to cede him that ground for reasons that will become more apparent later in this Essay.

6. Huffman, *Inconvenient Truths*, *supra* note 1, at 12.

7. See LON L. FULLER, *LEGAL FICTIONS* 29 (1967) (“A legal right reaches objectivity through court action; we have no other test of its ‘reality.’ If it meets this test, it is a real right—whatever may be the protestations of the agency enforcing it.”).

8. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–78 (1970) (recounting the historical background of the public trust doctrine).

9. See Huffman, *Inconvenient Truths*, *supra* note 1, at 28 (“For the new American states that succeeded to the king’s ownership, this legal fiction was critical to their economic and political success.”).

10. See, e.g., Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 341–44 (2005) (discussing the intersection of the public trust doctrine with takings jurisprudence); Craig, *supra* note 2 (examining the public trust doctrine in thirty-one eastern states); J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SE. ENVTL. L.J. 223 (2006) (proposing that natural capital and ecological services are economically

features, and its most common uses. Part III sets out Professor Huffman's critique of the doctrine's origins and poses as a rejoinder the legal fiction doctrine, which justifies the use of fictions in similar situations. Part IV of the Essay looks specifically at the Exclusive Economic Zone (EEZ), where numbers of wild fish are in a free fall because there is no coherent, comprehensive program to regulate activities in the area. This part of the Essay also discusses the phenomenon of a regulatory commons, which, according to Professor William Buzbee, arises when there is not "a matching political-legal regime,"¹¹ leaving the underlying social ill unattended.¹² The Essay suggests that the public trust doctrine can fill the regulatory gap on the EEZ by offering an interim management regime with protective normative standards and other management tools, and thus end the stasis created by the regulatory commons that has left the EEZ's resources unprotected.¹³ By highlighting the underlying social ill, application of the doctrine may actually encourage the enactment of positive law that can displace the stop gap common law regime and bring more regulatory certainty and uniformity to the area.

justifiable public trust doctrine uses); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980) (discussing the history of the public trust doctrine and advocating its continued use to protect expectations and to prevent destabilization); Sax, *supra* note 8 (describing the origins of the public trust doctrine and its many uses); Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SE. ENVTL. L.J. 47 (2006) (suggesting that the public trust doctrine's purpose comports with conservative ideas of avoiding excess and maintaining elected government's authority over critical resources); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989) (discussing the origins of the public trust doctrine). I have also previously written three articles on the public trust doctrine. See Hope M. Babcock, *Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride 'Em Charlie Tuna*, 26 STAN. ENVTL. L.J. 3 (2007) [hereinafter Babcock, *Ride 'Em Charlie Tuna*] (exploring various rationales and reasons for extending the public trust doctrine to the EEZ); Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 26-67 (1995) [hereinafter Babcock, *Wetlands and Coastal Barrier Beaches*] (discussing the possible application of common law doctrines of public trust and custom to coastal barrier beaches and wetlands); Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things that Go Bump in the Night*, 85 IOWA L. REV. 849, 880-98 (2000) [hereinafter Babcock, *Where the Wild Things Are*] (discussing the application of the public and wildlife trust doctrines to protecting wildlife).

11. William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 13 (2003) (arguing that, in some cases, the existence of a regulatory commons is due to how the applicable legal institutions developed, and in others, it results from the "mammoth scale of the problem").

12. *Id.*

13. I have argued elsewhere how the barriers to extending the public trust doctrine to the EEZ could be overcome and do not propose to redeploy those arguments here. See Babcock, *Ride 'Em Charlie Tuna*, *supra* note 10, at 53-68; see also Mary Turnipseed et al., *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*, 36 ECOLOGY L.Q. 1, 8-9 (2009) (arguing for the extension of the public trust doctrine to the EEZ).

The Essay closes by asserting that, for these reasons, the public trust doctrine is a good legal fiction. Not only is the doctrine doing no harm, but its potential expansion could fill gaps in positive law and offer much needed protection for vulnerable resources of communal value. Therefore, Professor Huffman's cavil against further expansion of the doctrine because of its "mythic" origins deserves no more attention than it has been given here.

II. THE PUBLIC TRUST DOCTRINE

The public trust doctrine is a potent common law property doctrine rooted in both Roman law and English common law.¹⁴ The doctrine protects land of communal value in perpetuity for free and unimpeded access by the public under a trust held by the sovereign.¹⁵ In this country, state courts have recognized the public trust doctrine since the early nineteenth century and have used it particularly to prevent the conversion of coastal resources to a private use.¹⁶ However, this has not prevented courts from extending the doctrine inland¹⁷ or from protecting uses of trust resources beyond the traditional uses of navigation, fishing, or commerce.¹⁸ Because private ownership can interfere with public

14. Mark Dowie, *Salmon and the Caesar: Will a Doctrine from the Roman Empire Sink Ocean Aquaculture?*, LEGAL AFF., Sept.–Oct. 2004, at 14, 14–16 (providing a succinct summary of the origins of the public trust doctrine and its passage through time); *see also* Thompson, *supra* note 10, at 50–54 (providing a brief overview of the public trust doctrine). *But see* Huffman, *Inconvenient Truths*, *supra* note 1, at 9–12 (describing as mythological the common-told tale of the public trust doctrine's origins).

15. *See* Babcock, *Wetlands and Coastal Barrier Beaches*, *supra* note 10, at 36.

16. *See, e.g.*, *Shively v. Bowlby*, 152 U.S. 1, 57–58 (1894) (applying the public trust doctrine to block private claims to submerged land); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413–14 (1842) (applying the public trust doctrine to block private claims to shellfish beds); *Arnold v. Mundy*, 6 N.J.L. 1, 10 (1821) (applying the public trust doctrine to block private claims to oyster beds); *Carson v. Blazer*, 2 Binn. 475, 494–95 (Pa. 1810) (applying the public trust doctrine to protect public use rights to the Susquehanna River); *see also* McQueen v. S.C. Coastal Council, 354 S.C. 142, 150–51, 580 S.E.2d 116, 120 (2003) (applying the public trust doctrine recently to protect coastal tidelands).

17. *See, e.g.*, *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 732 (Cal. 1983) (using the doctrine to stop Los Angeles from diverting a nontidal tributary of an inland lake); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1096 (Idaho 1983) (applying the public trust doctrine to a bay in a navigable lake); *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114, 126 (Mass. 1966) (applying the public trust doctrine to block the development of a ski resort on a northeastern mountain); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365–66 (N.J. 1984) (granting public access to the beach above the high watermark); *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, No. UNN-L-3026-04, 2008 WL 4177038 (N.J. Super. Ct. Law Div. Aug. 29, 2008) (letter opinion) (applying the public trust doctrine to block a trespass claim that the State lacked exclusive possession of the lands in question); *Just v. Marinette County*, 201 N.W.2d 761, 768–69 (Wis. 1972) (applying the public trust doctrine to interior wetlands); *see also* Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 108 (1986) (noting the inland expansion of the public trust doctrine); Turnipseed et al., *supra* note 13, at 19 n.109 (citing a multitude of cases extending the public trust doctrine to public resources and lands).

18. *See, e.g.*, *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (including recreation and aesthetics among protected uses of public trust resources and stating that the public trust doctrine is

access to trust resources,¹⁹ “absolute private dominion over property impressed with the public trust can never be granted unless it is in the public interest to do so.”²⁰

Courts have vigorously used the public trust doctrine to protect communal resources from inconsistent uses²¹ and have strictly scrutinized transfers of public trust resources to ensure that the transfers are in the public interest.²² Courts never lose their power to revoke a transfer that they later find is not in the public interest.²³ The virtual effect of the public trust doctrine is to convert the private owners of trust resources into permanent custodians of those resources under an easement held by the government “in favor of the general public.”²⁴ It is easy to see why opponents of the doctrine, like Professor Huffman, are so determined to rein it in.²⁵

III. THE PROFESSED MYTH OF THE PUBLIC TRUST DOCTRINE

Professor Huffman criticizes the “[a]mbitions” of public trust scholars who vigorously champion the “application of the public trust doctrine to natural

“sufficiently flexible to encompass changing public needs”); *Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 595–99 (Ct. App. 2008) (extending the public trust doctrine to wild birds); *see also* Lazarus, *supra* note 1, at 647–50 (discussing the accretion of the doctrine’s geographic scope and protected uses).

19. *See* *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (stating that resources are held in trust for people to “enjoy” them “free[] from the obstruction or interference of private parties”).

20. Babcock, *Ride ‘Em Charlie Tuna*, *supra* note 10, at 47 (quoting Babcock, *Where the Wild Things Are*, *supra* note 10, at 892).

21. *See* Sax, *supra* note 8, at 490.

22. *See Ill. Cent.*, 146 U.S. at 453 (“The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”); *Nat’l Audubon Soc’y*, 658 P.2d at 724 (“[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage . . . , surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”); *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1011 (Haw. 2006) (“The duties imposed upon the state are the duties of a trustee and not simply the duties of a good business manager.” (quoting *In re Water Use Permit Applications*, 9 P.3d 409, 455 (Haw. 2000))).

23. *See Ill. Cent.*, 146 U.S. at 453–54 (“In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, . . . they cannot be placed entirely beyond the direction and control of the State.”).

24. Babcock, *Where the Wild Things Are*, *supra* note 10, at 893.

25. For other examples of Professor Huffman’s writings criticizing the public trust doctrine, *see* Huffman, *A Fish Out of Water*, *supra* note 1, at 528; James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 175 (1987); and James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565, 565–69 (1986).

resource conservation and environmental protection”²⁶ for relying on what he calls “the myth that is the generally accepted version of public trust history.”²⁷ In his article, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, Professor Huffman methodically takes apart the historical underpinnings of the doctrine both under Roman and English law²⁸ and the foundational American decision, *Arnold v. Mundy*.²⁹ The latter case, he maintains, not only got that history wrong, but also misapprehended the contemporaneous law and practice of New Jersey.³⁰ In a similar fashion, he dispenses with *Illinois Central Railroad v. Illinois*,³¹ contending that “[t]he case has been badly misunderstood and its holding distorted.”³² In other words, the public trust “story is a fable”³³—a legal fiction.

Professor Huffman attributes the persistence of this “fable” as reflecting “a deeply rooted belief among Anglo-American lawyers that the judge and the legal advocate must demonstrate that the law they propound was indeed the law before the passions and self-interest of the particular case intervened”—hence the frequent references to totemic sources like Justinian, Blackstone, *Arnold*, *Waddell*, and *Illinois Central*.³⁴ Professor Huffman finds this willful ignorance of the doctrine’s history by academicians and judges in the service of “judicial intervention to limit the legislative and executive branches of government or to force those branches of government to impose limits on private individuals in the name of the public trust doctrine” deeply disturbing because “it shows little respect for the rule of law or for history.”³⁵

But courts have always engaged in legal myths or fictions.³⁶ It is not at all uncommon to find that legal doctrine is based “on false, debatable, or untested

26. Huffman, *Inconvenient Truths*, *supra* note 1, at 4.

27. *Id.* at 9.

28. *See id.* at 12–27.

29. *See id.* at 37–44 (citing *Arnold v. Mundy*, 6 N.J.L. 1 (1821)).

30. *See id.* at 41–43.

31. 146 U.S. 387 (1892).

32. Huffman, *Inconvenient Truths*, *supra* note 1, at 54; *see also* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004) (recounting a more robust history of *Illinois Central* than is usually told in legal literature).

33. Kearney & Merrill, *supra* note 32, at 931.

34. Huffman, *Inconvenient Truths*, *supra* note 1, at 95.

35. *Id.* at 101 (citing Sax, *supra* note 8, at 473). Huffman is also disturbed by the doctrine’s evolution because it leaves judges without a “bounded concept” to restrain their applications of the doctrine. *Id.* at 96. But not all property that the public values will warrant application of the public trust doctrine. It must be what Professor Carol Rose calls “inherently public property”—property that is “collectively ‘owned’ and ‘managed’ by society at large,” that performs some “service to commerce,” and that possesses certain qualities that offer “infinite ‘returns to scale.’” Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720, 723 (1986).

36. Legal fictions are to be distinguished from “legal subterfuges,” defined by Professor Peter J. Smith as “device[s] that accomplish[] a socially desirable end without making clear the calculus that produces that end.” Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1470

premises.”³⁷ Indeed, the truth may itself be contested and often is sacrificed to achieve another purpose.³⁸ “It would not therefore be inaccurate to claim that our reality is simply fiction differentiated, and that at bottom all law is reduced to a series of fictions heaped one upon another in successive layers.”³⁹

Legal fictions persist because they work; when they no longer work, it is because “they have lost touch with whatever it is that makes the legal process function effectively.”⁴⁰ The continued use of the public trust doctrine in this country for over 150 years and the lack of any indication that its use has somehow impeded the efficient operation of the legal process indicate that the doctrine works. The accuracy of the doctrine’s historical provenance is less important than the social purpose it performs—the protection in perpetuity of resources of use to the general public. Echoing this thought about the social purpose behind judicial doctrines, Professor Felix Cohen once stated:

A judicial decision is a social event. Like the enactment of a Federal statute, . . . a judicial decision is an intersection of social forces: Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it.⁴¹

(2007). Legal subterfuges are used “to mask the choices implicit in the application of existing legal rules,” not “to justify the creation of legal rules.” *Id.* at 1471.

37. *Id.* at 1439. Professor Smith notes the following as reasons for “why judges rely on new legal fictions”: (1) errors in the judges’ factual suppositions; (2) “the law’s general imperviousness to social science and change”; (3) the conscious or unconscious desire of the judge to “mak[e] normative choices in fashioning legal rules”; (4) the ability to “operationaliz[e] legal theories”; (5) the ability to “promote administrability in judicial process”; and (6) the ability to preserve a sense of legitimacy in the decision. *Id.* at 1439–40. Thus, the public trust doctrine also fits some aspects of Professor Smith’s concept of a “new legal fiction,” as judges who deploy it are either oblivious to the inaccuracies in the historical provenance of the doctrine or are using it to respond to the results of ecological empirical research showing the importance of certain natural resources, like submerged or tidal lands, which might otherwise not be protected by positive law.

38. See PIERRE DE TOURTOULON, *PHILOSOPHY IN THE DEVELOPMENT OF LAW* 395 (Ass’n of Am. Law Sch. ed., Martha McC. Read trans., Augustus M. Kelley 1969) (1922) (“In order to understand, a certain degree of intellectual stability is needful, and stability cannot be obtained except at the sacrifice of truth. Truth is in a state of perpetual oscillation; its mobility, its variety is disconcerting. We cannot grasp it without falsifying it.”); see also FULLER, *supra* note 7, at 10 (“A fiction is frequently a metaphorical way of expressing a truth. . . . The truth of a statement is, then, a question of degree.”).

39. TOURTOULON, *supra* note 38, at 387.

40. Mark H. Aultman, *Legal Fiction Becomes Legal Fantasy*, 7 J. LEGAL PROF. 31, 32 (1982). Of course, not all commentators are positive about the existence of legal fiction. See, e.g., JEREMY BENTHAM, *The Elements of the Art of Packing, as Applied to Special Juries, Particularly in Cases of Libel Law*, in 5 THE WORKS OF JEREMY BENTHAM 61, 92 (John Bowring ed., Edinburgh, William Tait 1843) (“[Legal] fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness.”).

41. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935).

Before the era of positive law, “judges routinely relied on legal fictions to mask the effects of legal change,” especially “to avoid changing a legal rule that required a particular factual predicate for its application” where the factual assertion triggering the common law rule “plainly was false.”⁴² The evolution in the public trust doctrine’s story that Professor Huffman derides reflected the needs of a new nation to encourage and “regulat[e] interstate commerce” on its waters, to protect the public’s uses of those waters, and to ensure the unimpeded rights of the states in the resources of their coasts, rivers, and submerged lands.⁴³ A doctrine that developed as a prerogative of the Crown to use or grant rights in trust resources no longer suited either the American experience or the developing nation’s wishes.⁴⁴ To the extent the story of the public trust doctrine changed over time, it was trying “to escape the consequences of an existing, specific rule of law,”⁴⁵ which favored individual ownership over communal use rights.

The legal fiction of the public trust doctrine is no more than an example of what Professor Lon Fuller calls “the growing pains of the language of the law”⁴⁶—a way of adjusting old rules to new facts to lessen the impact of legal change.⁴⁷ As a result, legal fictions are frequently found in “[d]eveloping fields of the law, . . . where new social and business practices are necessitating a reconstruction of legal doctrine.”⁴⁸ These fictions cannot be rejected because

42. Smith, *supra* note 36, at 1437. Even “[a]s the common law has waned as a source of legal rules [and] judges have relied on classic legal fictions with less frequency,” judges continue to use “new legal fictions.” *Id.* Professor Smith distinguishes between what he calls classic legal fictions and new legal fictions, saying that the former “were not intended to deceive,” while the latter, which also are premised on faulty factual assumptions, “involve a lack of judicial candor,” which Professor Smith finds troubling. *Id.* at 1440.

43. See Turnipseed et al., *supra* note 13, at 11–12 (describing the doctrine’s use until the early twentieth century and noting that its contours have “evolved to fit the perceived needs of society”). Another example of a legal fiction that served the needs of an expanding nation is the “equal footing doctrine,” under which new states were deemed entitled to the same sovereign prerogatives over their navigable waters and the lands lying underneath those waters as the original thirteen states. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228–29 (1845). For a more modern application of the equal footing doctrine used to defeat tribal rights to regulate fishing and hunting rights along the Big Horn River when the State claimed ownership of the riverbed, see *Montana v. United States*, 450 U.S. 544, 551 (1981).

44. Professor Fuller noted, “One cannot introduce sweeping changes in linguistic usage by an arbitrary fiat; in general, new meanings grow only in places where they are needed.” FULLER, *supra* note 7, at 21.

45. *Id.* at 53; see also *id.* at 52 (“[T]he necessity for fiction will vary directly with the number and inflexibility of the postulates assumed.”).

46. *Id.* at 21–22; see also *id.* at 2 (“The fiction has generally been regarded as something of which the law ought to be ashamed, and yet with which the law cannot, as yet, dispense.”).

47. Professor Smith distinguishes classic legal fictions, which he characterizes as “device[s] for softening (or, depending on one’s perspective, obscuring) the effects of legal change,” defined as a departure from an established legal regime, from new legal fictions, which are used to *justify* doctrine. Smith, *supra* note 36, at 1470.

48. FULLER, *supra* note 7, at 68. Although Professor Fuller was talking about modern changes to corporate and business law when he made this comment and not about environmental

they are the “inevitable accompaniment[s] of progress in the law itself and this progress can scarcely be expected to wait out of deference for the tastes of those who experience an unpleasant sensation at the sight of words browsing beyond their traditional pastures.”⁴⁹

Professor Huffman’s so-called public trust doctrine fable endures because it “resonate[s] with audiences,” reflecting “discomfort, at least at the level of popular culture, with particular legal rules.”⁵⁰ This discomfort can indicate a certain measure of instability in the law and the possibility of reform.⁵¹ Indeed, legal fables often “converge on and point to vulnerable legal rules.”⁵² Thus, to the extent that the public trust doctrine has evolved and expanded to protect communal resources of value to the general public from privatization—where positive law has failed—it has always pointed toward some vulnerability in the extant legal rules.⁵³ Indeed, as Mary Turnipseed and her coauthors point out, Professor Sax’s resurrection of the doctrine in his 1970 *Michigan Law Review* article was intended to cure basic problems with democracy itself, which he felt “was being corrupted by well-organized special interests,”⁵⁴ and to serve “as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems” where one was lacking.⁵⁵

Legal fictions can be likened to a metaphor, which courts use to “keep the . . . law persuasive.”⁵⁶ “Eliminate metaphor from the law and you have reduced its power to convince and convert.”⁵⁷ The origin story of the public trust doctrine is comparable to a metaphor—a figure of speech replacing the much longer, complex, and sometimes contradictory explanation of the doctrine’s genesis. This metaphor, in turn, is like an “abbreviatory fiction[]”—a

and natural resources law, as those fields had not yet developed, the underlying thought is applicable to any evolving legal field.

49. *Id.* at 22.

50. Saul P. Levmore, *Fables, Sagas, and Laws*, 33 WILLAMETTE L. REV. 485, 486 (1997) (“[T]his discomfort or uneasiness often coincides with theoretical (or highbrow) problems regarding the same rules . . .”).

51. *Id.* at 486–87 (noting that “law from the bottom up”—such as people’s reliance on “stubborn sources of sagas”—may predict where legal reform will take place); *see also* FULLER, *supra* note 7, at 21 (“One cannot introduce sweeping changes in linguistic usage by an arbitrary fiat; in general, new meanings grow only in places where they are needed.”).

52. Levmore, *supra* note 50, at 495.

53. *See id.*

54. Turnipseed et al., *supra* note 13, at 13; *see also* Sax, *supra* note 8, at 556 (“Public trust problems . . . occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals.”), *quoted in* Turnipseed et al., *supra* note 13, at 13–14.

55. Sax, *supra* note 8, at 474.

56. FULLER, *supra* note 7, at 24; *see also id.* at 26 (using the example of constructive notice to “show how far the human mind is willing to go to preserve a comforting and persuasive analogy,” even if this preservation is “at the cost of good sense”).

57. *Id.* at 24.

“convenient shorthand” that “once served a historical purpose” and that has “been retained for [its] descriptive power.”⁵⁸

What troubles Professor Huffman—the constant repetition of the mythological origins of the public trust doctrine⁵⁹—is little more than a court using the doctrine to legitimize public expectations about the public nature of certain resources to which people feel entitled. Thus, Huffman’s statement that “*Arnold v. Mundy*, *Martin v. Waddell* and *Illinois Central Railroad v. Illinois* were exceptions to the norm”⁶⁰ is beside the point. Over time, through constant repetition, the exceptions became the norm. The courts’ continued use of the doctrine, despite the questionable accuracy of its historical roots, is an acknowledgment of the law’s expressive function⁶¹ to the extent that people have reacted to the law and conformed their behavior and expectations to it. Abandoning the fable, when the highest court in the land has relied on it repeatedly,⁶² would have “delegitimizing consequences.”⁶³ This would be especially true for landowners whose property has been subjected to the doctrine and for states and conservationists who have relied on the doctrine for over 150 years to protect vulnerable natural resources of communal value. Indeed, one “central idea” of the public trust doctrine is to protect “public expectations against destabilizing changes” in much the same way that private property has been protected.⁶⁴ Thus, it would be counterintuitive to abandon the doctrine or to curtail its use in the interests of restoring stability to the law.⁶⁵

Another purpose of a legal fiction, according to Fuller, is “to reconcile a specific legal result with some premise or postulate.”⁶⁶ Here, the desired legal

58. *Id.* at 81 (noting that such legal fictions are like “the algebra of law” (quoting TOURTOULON, *supra* note 38, at 385)).

59. See Huffman, *Inconvenient Truths*, *supra* note 1, at 9–12.

60. *Id.* at 79.

61. See Smith, *supra* note 36, at 1478.

62. See Phillips Petrol. Co. v. Mississippi, 484 U.S. 469, 484–85 (1988) (applying the public trust doctrine on state nonnavigable tidelands); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452–54 (1892) (applying the public trust doctrine to block conveyance of a Lake Michigan lakebed to a private railroad); Smith v. Maryland, 59 U.S. (18 How.) 71, 74–75 (1855) (recognizing that states held submerged lands in trust for public uses like fishing and had a duty to preserve those uses “unimpaired”); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413–14 (1842) (applying the public trust doctrine to block private claims to shellfish beds); cf. *Summa Corp. v. California ex rel. State Lands Comm’n*, 466 U.S. 198, 209 (1984) (rejecting state’s trusteeship claim in tidelands originating in Mexican land grants because the State failed to assert trusteeship rights during federal patent hearings).

63. Smith, *supra* note 36, at 1440.

64. Sax, *supra* note 10, at 188 (“The function of the public trust as a legal doctrine is to protect such public expectations against destabilizing changes, just as we protect conventional private property from such changes.”).

65. But see Huffman, *Inconvenient Truths*, *supra* note 1, at 102–03 (“The ad hoc and ill-informed telling of [the] history [of the public trust doctrine] . . . does not provide justification to secure for the public, in the name of newly conceived notions of common rights and without compensation, resources heretofore privately owned.”).

66. FULLER, *supra* note 7, at 51.

result is to keep certain highly valued natural areas open to all, and the theoretical premise or postulate is that those resources are held in common by all citizens. The public trust doctrine is the story that links the desired legal result to the theoretical premise about the nature of certain properties. One response to Professor Huffman's criticism of the judicial mantra consisting of the doctrine's Roman and English origins and the core cases that judges recite when they invoke the public trust doctrine is, as Professor Fuller has explained, that the motives for historical fiction reflect the limitation of human reasoning to the extent that it must "proceed by assimilating that which is unfamiliar to that which is already known."⁶⁷

However, legal fictions can become dangerous⁶⁸ if "believed."⁶⁹ Fuller recognizes that "[a] fiction starts as a pretense, and may, through a process of linguistic development, end as a 'fact.'"⁷⁰ When these fictive facts become "simplificatory falsifications of reality," they can be problematic if used for purposes not in the mind of their inventor.⁷¹ While the supposed fictive origins of the public trust doctrine have been believed, the purpose for which the doctrine has been used in this country has never varied from the original intent—to maintain certain publicly valuable resources open to public use.

Even if certain legal fictions may be dangerous, there are circumstances in which it may be important to maintain them, such as the need to preserve legal continuity, "the traditional justification for classic legal fictions,"⁷² or to preserve the political and legal order.⁷³ These needs could justify the fiction's continuation, particularly where its abandonment might "risk[] creating avulsive

67. *Id.* at 65.

68. Felix Cohen has a different concern about legal fictions—relying on traditional jurisprudence's "vivid fictions and metaphors" as a basis for decisions makes the author of the particular decision "apt to forget the social forces which mold the law and the social ideals by which the law is to be judged." Cohen, *supra* note 41, at 812.

69. FULLER, *supra* note 7, at 9–10; *see also* Aultman, *supra* note 40, at 32 ("Whether [something] is legal fiction or legal fantasy depends not on the truth of the statement 'in itself,' but upon what one intends to do with it—whom one intends to fool by it."); FULLER, *supra* note 7, at 6 ("[A] fiction is distinguished from a lie by the fact that it is not intended to deceive."). Professor Smith finds the danger in legal fictions to be the extent to which judges are not candid about their use of legal fictions and their reasons for using them. Smith, *supra* note 36, at 1481 ("[J]udicial candor presumptively is desirable.").

70. FULLER, *supra* note 7, at 77.

71. *Id.* at 107; *see also id.* at 119 ("[W]hen a single step in a process of reasoning is removed from its corrective background and given a value on its own account, the inevitable result is intellectual disaster. . . . The isolation of . . . a concept . . . from its compensatory context is dangerous.").

72. Smith, *supra* note 36, at 1486.

73. *See* Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 185–86 (1988) ("As scientists, we consider it our purpose to destroy myths. But we should recognize that the 'myths of democracy' may be essential to . . . stable political order . . .").

legal change.”⁷⁴ Here, abandoning the “fable” of the public trust doctrine could have a major impact on property law, where the doctrine has become a fundamental tenet of the field.⁷⁵

Legal fictions, like the public trust doctrine, “are almost always justificatory devices—that is, they are used to ground and justify legal doctrine, even though the very explanation is itself demonstrably or at least arguably false.”⁷⁶ Sometimes legal fictions are “based on a misunderstanding or misreading of empirical reality” and thus appear “not intended to mask a normative choice.”⁷⁷ Just as often, however, judges use them “to conceal that they are making normative choices in fashioning legal rules” in “service of some *other* normative goal, such as to legitimate some aspect of the legal system or to operationalize a legal theory.”⁷⁸ Either situation may apply to the public trust doctrine—a benign misreading of its historical provenance or a normative choice to legitimize a legal rule that has embedded itself into property law. Regardless of what jurisprudential function the doctrine is performing, it has performed well over the centuries, in part, because it has been able to evolve to respond to new social ills.⁷⁹ In this sense, the public trust doctrine is a good legal fiction whose application and effectiveness should not be curtailed.

Fuller confidently predicts that “[i]f judges and legal writers have used the fiction in the past, and are using it now, they will probably continue to use it in the future.”⁸⁰ That certainly seems to be the case with the public trust doctrine and the story of its origins. What Professor Huffman terms a fable has indeed become a fact. The public trust doctrine is an example of Fuller’s “abbreviatory

74. Smith, *supra* note 36, at 1487 (discussing the creation and abandonment of new legal fictions and stating that “[t]he argument for stare decisis is strongest in those cases in which the new legal fiction has branched out, serving as the basis for a wide range of legal rules”). Despite acknowledging that precedent can serve as “a reason to preserve a mistaken premise,” Professor Smith argues that it cannot serve as “a reason to obscure the basis for the decision to preserve it.” *Id.* at 1488.

75. One indication of this is that the public trust doctrine has become a common topic for discussion in law school casebooks. *See, e.g.*, SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW (5th ed. 2007) (devoting ten pages to the doctrine and related concepts); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2007) (devoting thirty-five pages to the topic); *see also* Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 516 (1989) (arguing that the public trust doctrine deserves more recognition); Ralph W. Johnson & William C. Galloway, *Protection of Biodiversity Under the Public Trust Doctrine*, 8 TUL. ENVTL. L.J. 21, 29 (1994) (stating that the public trust doctrine “binds state agencies as well as private parties” because it is “a rule of property law” once state courts adopt it).

76. Smith, *supra* note 36, at 1471–72.

77. *Id.* at 1472.

78. *Id.* at 1473–74.

79. *See* Turnipseed et al., *supra* note 13, at 14 n.71 (commenting that between the publication of Professor Sax’s original article in 1970 and the publication of Professor Richard Lazarus’s article in 1986, “more than one hundred judicial opinions in twenty-five states had invoked the doctrine” (citing Lazarus, *supra* note 1, 644 & n.77)).

80. FULLER, *supra* note 7, at 93.

fiction["]”—a “convenient shorthand” retained for its descriptive and rhetorical power.⁸¹ The accuracy of the doctrine’s origins, which so occupies Professor Huffman, is much less important than the bridge that the doctrine creates between certain theoretical assumptions about the nature of common property and the need to preserve its ecological value.

To illustrate the importance of not constraining the public trust doctrine, this Essay turns to the EEZ and its communally important resources that are inadequately protected by the current regulatory framework. Part IV identifies the ways in which the public trust doctrine can respond to that problem and, in the process, justifies the claim that it is a good legal fiction.

IV. WHY IT IS IMPORTANT NOT TO IMPEDE THE EXPANSION OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine performs at least four major functions with respect to protecting communally valuable natural resources, such as those found in the EEZ. First, the doctrine can be used to fill regulatory gaps until positive law is enacted to displace it. Second, the doctrine offers interim normative standards and other management tools to guide a resource manager faced with a proposal to convert public trust resources to a noncommunal purpose. Third, applying the public trust doctrine may encourage the enactment of positive law by putting a spotlight on the underlying social ills. Fourth, application of the doctrine to a regulatory commons, like the EEZ, will end the commons because the doctrine’s use will change the dynamic preventing enactment of positive law.

A. Filling the Regulatory Gap

One function of common law in a statutory legal regime is to fill gaps left in the legal framework.⁸² In the case of the public trust doctrine, the subsequent enactment of laws to fill those gaps has done nothing to diminish the doctrine’s use.⁸³ Indeed, the continued vibrancy of nuisance law and other common law

81. *Id.* at 81.

82. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 63 (6th ed. 2009) (“The common law articulates foundational principles that have shaped the development of regulatory programs and it retains considerable vitality as a safety net when unregulated activities cause environmental harm.”); Sax, *supra* note 8, at 474 (suggesting that the public trust doctrine could function as a gap filler for environmental protection laws that had not yet been written when his article was published).

83. See, e.g., *Avenal v. State*, 886 So. 2d 1085, 1101–02, 1106 (La. 2004) (invoking the public trust doctrine to defeat a takings claim against a state water diversion project even though it destroyed oyster leases’ value and finding that the state did not owe compensation when its actions were consistent with the background principles of state property law because the owner had no vested right to undertake those uses in the first place); *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 113 (N.J. 2005) (applying the public trust doctrine to allow public access to a private beach for a fee); *Gwathmey v. State*, 464 S.E.2d 674, 686 (N.C. 1995) (holding that the public trust doctrine protected coastal marshes that were navigable in fact); *Palazzolo v. State*, No.

doctrines, such as the public trust doctrine,⁸⁴ even in the face of regulatory programs, attests to that fact.⁸⁵

The gap-filling function of common law is particularly important when applied to natural resources of communal value that are under siege by private commercial interests because these resources are inadequately protected by positive law.⁸⁶ The waters and resources of the EEZ illustrate this problem.⁸⁷

WM 88-0297, 2005 WL 1645974, at *15 (R.I. Super. Ct. July 5, 2005) (using the public trust doctrine to support a finding that no compensable taking occurred when the State prohibited the development of property below the mean high-water line); *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149–51, 580 S.E.2d 116, 119–20 (2003) (employing the public trust doctrine to defeat a takings claim by a landowner seeking to develop beachfront property).

84. See, e.g., Babcock, *Wetlands and Coastal Barrier Beaches*, *supra* note 10, at 23 (“[N]uisance is a vibrant common law doctrine which has been and continues to be used to protect land from harmful development.”); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233, 249 (1980) (“Courts have used the public use doctrine, developed largely since the Second World War, to protect the public right of navigation on waters that are recreationally but not commercially navigable, where the beds are generally privately owned.”); Michael L. Wolz, Comment, *Applications of the Public Trust Doctrine to the Protection and Preservation of Wetlands: Can It Fill the Statutory Gaps?*, 6 BYU J. PUB. L. 475, 478 (1992) (“[T]he public trust doctrine fills a vital gap in the protection of wetlands which the present federal and state protection schemes have left unprotected.”).

85. See Babcock, *Wetlands and Coastal Barrier Beaches*, *supra* note 10, at 22–23 (discussing the continuing vibrancy of the nuisance doctrine despite the enactment of pollution control laws). In fact, many laws, like the Clean Water Act, 33 U.S.C. § 1365(e) (2006), and the Clean Air Act, 42 U.S.C. § 7604(e) (2006), contain savings clauses specifically preserving common law claims and remedies sought by citizens. *But see* *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (recognizing the existence of federal common law but holding that the passage of the Clean Water Act sufficiently occupied the field to displace a federal common law nuisance action); *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972) (“It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.”).

86. Professor Wood proposes another type of gap-filling function for the public trust doctrine—what she calls an “interstitial duty,” which involves using the doctrine to guide or cabin the discretion regulators have under statutory laws. Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91, 103 (2009); *see also* *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1010 (Haw. 2006) (“Although in some respect, exercise of [the Department of Health’s] authority is discretionary in nature, such discretionary authority is circumscribed by the public trust doctrine.”).

87. See Babcock, *Ride ‘Em Charlie Tuna*, *supra* note 10, at 25–33 (discussing the “kaleidoscope of federal and state laws that might apply” to an activity in the EEZ, like ocean fish ranching, but explaining that “[d]espite this impressive array of laws that *might* be applied to ocean ranching in the EEZ, there is no comprehensive regulatory program that *does* apply, and there are many gaps in the potential federal regulatory net”); Cathy J. Lewis, *The Timid Approach of the Federal Courts to the Public Trust Doctrine: Justified Reluctance or Dereliction of Duty?*, 19 PUB. LAND & RESOURCES L. REV. 51, 59 (1998) (commenting that the federal courts’ reluctance “to embrace the public trust doctrine is not warranted” because federal statutes have not “wholly occupied” the field of water resources management and that “the finding of a duty on the part of a federal agency is entirely appropriate and a proper complement to existing state law where the

The public trust doctrine offers normative standards and other management tools, as discussed in the next section, that can operate prospectively to protect resources of communal value, such as marine resources, until a comprehensive regulatory regime is enacted.⁸⁸

The failure to develop a comprehensive regulatory structure for the EEZ⁸⁹ has caused wild fish stocks to plummet from overfishing, leaving the fish that remain vulnerable to the adverse effects of an array of nonfishing commercial activities, such as fish and wind farms and deep seabed mining.⁹⁰ Despite the apparent recovery of four badly depleted wild fish stocks,⁹¹ the persistent possibility of a “global collapse of fish stocks” if current fishing trends continue⁹² illustrates the seriousness of this problem and magnifies the impact of additional disturbances on these stocks.

Application of the public trust doctrine to fill the regulatory gap on the EEZ might avert this environmental crisis and the resulting economic destabilization that would occur from the global collapse of the world’s fisheries. According to

threatened harm is not addressed by a state resource protection statute,” and thus there is no need for courts to abstain from imposing such duties).

88. See Babcock, *Where the Wild Things Are*, *supra* note 10, at 891 (discussing previous extensions of the public trust doctrine).

89. According to the Pew Oceans Commission, United States ocean policy is “[n]ot a system at all[;] U.S. ocean policy is a hodgepodge of individual laws that has grown by accretion over the years, often in response to crisis.” PEW OCEANS COMM’N, AMERICA’S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE 26 (2003), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/env_pew_oceans_final_report.pdf.

90. See, e.g., Babcock, *Ride ‘Em Charlie Tuna*, *supra* note 10, at 22 (discussing the impact of offshore fish farming). Threats from offshore wind farms include birds striking the turbines, interference with marine mammal migrations, and fishing boats hitting the structures in bad weather. See Gero Vella, *The Environmental Implications of Offshore Wind Generation*, 2 UTIL. PROJECT 126, 126, 128 (2002), http://offshorewind.net/Other_Pages/Links_Library/The_Environmental_Implications_of_Offshore_Wind_Generation.pdf. The impacts from ocean mining are similar to those that occur on land, but they also include interference with fish habitat and migration routes, discharge of waste from mining ships, and the impact of noise on migrating mammals. See Jan Magne Markussen, *Deep Seabed Mining and the Environment: Consequences, Perceptions, and Regulations*, 1994 GREEN GLOBE YEARBOOK OF INT’L CO-OPERATION ON ENV’T & DEV. 31, 31–34; Vella, *supra*, at 128–29.

91. Allison Winter, *Fisheries: 4 Depleted Stocks Recover, but Overfishing Persists*, GREENWIRE, May 19, 2009, <http://www.cenews.net/Greenwire/print/2009/05/19/5>; cf. Donna R. Christie, *Marine Reserves, the Public Trust Doctrine and Intergenerational Equity*, 19 J. LAND USE & ENVTL. L. 427, 428 (2004) (“[T]he combined effects of current fishing practices alter the composition of ecological communities and the ‘structure, function, productivity, and resilience of marine ecosystems. . . .’ Loss of biodiversity leads to decreased functional diversity as well as an increase in the inherent unpredictability of ecosystems and a reduction in overall biological productivity.” (quoting PAUL K. DAYTON ET AL., PEW OCEANS COMM’N, ECOLOGICAL EFFECTS OF FISHING IN MARINE ECOSYSTEMS OF THE UNITED STATES 1 (2002))).

92. Kevin J. Lynch, Student Article, *Application of the Public Trust Doctrine to Modern Fishery Management Regimes*, 15 N.Y.U. ENVTL. L.J. 285, 285 n.1 (2007) (citing Boris Worm et al., *Impacts of Biodiversity Loss on Ocean Ecosystem Services*, 314 SCI. 787, 790 (2006)); see also *id.* at 285 (noting that tuna, marlin, and swordfish populations “have declined by up to 90%”).

Professor Sax, averting such crises is one function of the public trust doctrine.⁹³ Applying the public trust doctrine to the EEZ would, in addition, affirm the interests of the United States in those waters and resources⁹⁴ and protect state economic interests in those resources.⁹⁵ Indeed, because fish are a migratory species, the benefits of protecting them through the public trust doctrine are often enjoyed beyond the geographic boundaries of the trust resources.⁹⁶

B. Providing Normative Standards and Other Management Tools

The public trust doctrine, with its emphasis on preserving trust resources for future generations, offers normative management standards that can guide resource managers.⁹⁷ The doctrine's ability to "constrain the natural tendency of governmental officials to exhaust resources in the present generation" acts like "a normative anchor . . . geared towards sustaining society for generations to come."⁹⁸

For example, the public trust standard of nonimpairment is similar to preserving the sustainability of a given natural resource.⁹⁹ Professor Wood suggests that this is nothing more than "[t]he basic fiduciary duty . . . to maintain [an] asset's ability to provide a steady abundance of environmental services for future generations."¹⁰⁰ A sustainability standard could inform the levels at which and circumstances under which fish are harvested or other natural resources are

93. See Sax, *supra* note 10, at 188–89.

94. See Lynch, *supra* note 92, at 298 (“[T]he assertion of [federal] dominion over the EEZ establishes the rights of the United States in that zone. Protection and control of these areas of the sea is ‘a function of national external sovereignty.’” (quoting *United States v. California*, 332 U.S. 19, 34 (1947))).

95. The earliest uses of the public trust doctrine in this country were to protect the public's right to fish in state waters. Stephen E. Roady, *The Public Trust Doctrine*, in OCEAN AND COASTAL LAW AND POLICY 39, 52 (Donald C. Baur et al. eds., 2008); see also *Ventura County Commercial Fishermen's Ass'n v. Cal. Fish & Game Comm'n*, 2d Civil No. B166335, 2004 WL 293565, at *5 (Cal. Ct. App. Feb. 17, 2004) (citing *People v. Zankich*, 98 Cal. Rptr. 387, 392–93 (Ct. App. 1971)) (allowing California to establish no-take zones as a way to protect fish stocks); *Zankich*, 98 Cal. Rptr. at 393 (allowing the state to close fishing areas in certain circumstances); *Arnold v. Mundy*, 6 N.J.L. 1, 10 (1821) (prohibiting a coastal property owner from closing oyster beds on tidelands adjacent to his property).

96. Cf. Ruhl & Salzman, *supra* note 10, at 234 (“[P]rotected trust uses such as navigation produce commercial benefits often distributed well beyond the physical boundaries of the trust resources over which such uses occur.”).

97. See *id.* at 232 (suggesting incorporating into the public trust doctrine “the concepts of natural capital and ecosystem services” to make the doctrine even more ecological and to enhance its use to protect trust resources).

98. Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605, 612 (2004).

99. See Deborah G. Musiker et al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 96 (1995) (stating that the government has a trust duty “to prevent substantial impairment” of wildlife to preserve the resource for “current and future generations”).

100. Wood, *supra* note 86, at 95.

depleted.¹⁰¹ Such a standard means, for example, that wild fish stocks must be left in a sustainable state after harvesting—in other words, development of the resource to satisfy present needs cannot be at the expense of “the ability of future generations to satisfy their . . . needs.”¹⁰² The management standards put in place as a result of the application of the public trust doctrine could then inform whatever regulatory regime the federal government develops.

Specifically with respect to the EEZ, the public trust doctrine offers “guiding principle[s] . . . to evaluate the increasingly complex trade-offs among human activities in the ocean[s] . . . and to ensure that ‘users [of trust resources] compensate the [putative beneficiaries of those resources, the public,] through the payment of appropriate rents and royalties.’”¹⁰³ For example, the doctrine’s emphasis on preserving trust resources for present and future generations requires the nonexclusive uses and “‘reversible commitments’” of these resources.¹⁰⁴ Therefore, consistent with public trust principles, a resource manager cannot allow any single user of trust resources to consume the entire resource.¹⁰⁵ The doctrine invites the application of “a place-based management framework to regulate the panoply of ocean industries.”¹⁰⁶ The combination of trust principles and the need to accommodate competing uses of trust resources could lead to spatial zoning of the EEZ and the development of comprehensive resource management plans.¹⁰⁷

To help with the process of choosing between uses of trust resources, the public trust doctrine also offers a balancing mechanism under which the public’s interest in maintaining stocks of wild fish can be balanced against other nontrust uses of the area that are proposed.¹⁰⁸ In doing this, a decision maker who is

101. For example, a standard could inform the time (season), duration, location, and manner (gear or boat type) in which fishers harvest fish. See MARY CHRISTINA WOOD, NATURE’S TRUST (forthcoming 2011) (manuscript at 47, on file with author) (suggesting that the public trust doctrine contains fiduciary standards that “can be expressed as species recovery targets, sustainable logging rates, in-stream flows, carbon pollution reduction goals, and so forth, all calibrated towards replenishing Nature’s assets”).

102. Sam Kalen, *The Coastal Zone Management Act of Today: Does Sustainability Have a Chance?*, 15 SE. ENVTL. L.J. 191, 212 n.112 (2006).

103. Turnipseed et al., *supra* note 13, at 67 (quoting Oran R. Young et al., *Solving the Crisis in Ocean Governance: Place-Based Management of Marine Ecosystems*, ENV’T, May 2007, at 20, 29).

104. *Id.* (quoting Jack H. Archer & M. Casey Jarman, *Sovereign Rights and Responsibilities: Applying Public Trust Principles to the Management of EEZ Space and Resources*, 17 OCEAN & COASTAL MGMT. 253, 265 (1992)).

105. See Wood, *supra* note 86, at 105 (advocating that environmental agencies use public trust principles to help them “‘just say no’ to . . . permit applications”).

106. Turnipseed et al., *supra* note 13, at 66.

107. See *id.* at 63–67.

108. See Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 728 (Cal. 1983) (requiring that the State include an explicit balancing test of consumptive and nonconsumptive uses when setting lake levels); Superior Pub. Rights, Inc. v. Mich. Dep’t of Natural Res., 263 N.W.2d 290, 297 (Mich. Ct. App. 1977) (acknowledging that statutes require the State to balance water-related trust interests with other interests).

presented with an application for a fish or wind farm must carefully consider the activity's impact on trust resources and assure herself that the conversion of trust resources serves a public interest and that the use "do[es] not substantially impair the public interest in the lands and waters remaining."¹⁰⁹ As part of that process, Professor Wood's suggestion that the familiar trust mechanism of accounting could be applied to public trust resources to prevent their waste might give even greater precision regarding how to strike the balance between uses.¹¹⁰

C. *Encouraging the Enactment of Positive Law*

The use of common law remedies, like the public trust doctrine, to address unregulated social ills may spur the development of positive law. Indeed, because of the doctrine's utility, many states have enacted the public trust doctrine into their positive laws,¹¹¹ some even folding the doctrine into their constitutions.¹¹²

A potential interaction between the doctrine and positive law might flow from the publicity inherent in the filing of a public trust lawsuit. Such lawsuits highlight the underlying social ills that triggered the legal action, creating public awareness of those ills. The public attention, in turn, might encourage some opportunism by politicians, Professor Buzbee's "policy entrepreneurs,"¹¹³ to seize the regulatory moment and enact corrective legislation.¹¹⁴

Another cause and effect scenario between the public trust doctrine and positive law might arise from the reaction of individuals who fall victim to the doctrine's ability to disrupt what might otherwise be seen as a legitimate use of private property. These individuals may conclude that it is in their best interest to

109. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

110. See Wood, *supra* note 86, at 101–02.

111. See, e.g., S.C. CODE ANN. §§ 48-39-270 to -360 (2008) (providing for beach protection to restore the beach and dune system to its natural equilibrium); Turnipseed et al., *supra* note 13, at 23 n.128 (describing the statutory provisions of North Carolina, Massachusetts, Louisiana, and New Jersey, which all incorporate public trust principles into their environmental laws). A nonpublic trust example of common law principles being folded into law is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.). See PERCIVAL ET AL., *supra* note 82, at 393 ("[I]t is important to understand that in many respects CERCLA represents a natural adaption of centuries of common law developments as extended by modern environmental statutes.").

112. See, e.g., CAL. CONST. art. 10, §§ 3–4 (restricting sale of certain tidelands and protecting public access to tidelands and navigable waters); see also Craig, *supra* note 2, at 20–25 (discussing the constitutional provisions of ten states that codify the public trust doctrine, including South Carolina, Alabama, Illinois, Minnesota, Mississippi, Pennsylvania, Rhode Island, Tennessee, Vermont, and Wisconsin); Turnipseed et al., *supra* note 13, at 23 n.129 (describing the state constitutional public trust provisions of Alaska, Florida, Hawaii, and Pennsylvania).

113. Buzbee, *supra* note 11, at 54 (describing policy entrepreneurs as individuals who see an opportunity to "advance politically by offering constituents a collective benefit").

114. See *id.* at 55 ("[A] combination of external events, political incentives, and changing information and political perceptions can create conditions for enactment of unlikely regulatory schemes.").

seek a regulatory solution as a means of achieving greater stability and the uniform treatment of individuals in similar situations.¹¹⁵

D. Ending the Regulatory Commons

The EEZ is a classic commons.¹¹⁶ Indeed, it is the commons characteristic of oceans and the fact that their resources are open to all that have contributed to the dramatic decline in fish stocks¹¹⁷ and that have led to inquiries about extending the public trust doctrine to stop this decline.¹¹⁸ But there is another type of commons that threatens resources like the EEZ, and that is a “regulatory commons.”¹¹⁹ The ocean is a typical regulatory commons.¹²⁰ This problem introduces the fourth benefit of the public trust doctrine—ending the regulatory commons.

115. Although it is too early to tell, an example of this may be how Congress responds to the recent Second Circuit decision in *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), where the court found that the plaintiffs successfully stated claims under federal common law of nuisance because of the harm they suffered from the defendants’ failure to reduce their contributions to global warming. *Id.* at 316, 392–93. Circuit Judge Hall concluded, “It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance’ by greenhouse gases.” *Id.* at 392–93 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972)).

116. See Montserrat Gorina-Ysern, *World Ocean Public Trust: High Seas Fisheries After Grotius—Towards A New Ocean Ethos?*, 34 GOLDEN GATE U. L. REV. 645, 664 (2004) (stating the view of some that the oceans are “open to everyone, belonging to everyone, and incapable of appropriation by anyone” (citing R.P. Anand, *International Machinery for Sea-Bed: Issues and Prospects*, 13 INDIAN J. INT’L L. 351, 352 (1973))).

117. See Alison Rieser, *Prescriptions for the Commons: Environmental Scholarship and the Fishing Quotas Debate*, 23 HARV. ENVTL. L. REV. 393, 400–01 (1999) (noting that “[t]he physical nature of common-pool resources [like fisheries] tends to encourage their overconsumption” because of “the difficulty of excluding other potential users” from the resource, as fish stock may be seasonally migratory and located at a significant distance from land, and because once fish are “capture[d]” they are not “available to other fishers, predators, or to the stock itself for reproduction”).

118. See, e.g., Gail Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. ENVTL. L. & LITIG. 317, 367–68 (2006) (advocating that the public trust doctrine be used to protect ocean ecosystems so that they can continue “to produce ecosystem services,” including “food, medicine, climate stabilization, recreation, aesthetic enjoyment, as well as navigation and commerce”); see also Archer & Jarman, *supra* note 104 (arguing that the public trust doctrine should be extended to the EEZ); Casey Jarman, *The Public Trust Doctrine in the Exclusive Economic Zone*, 65 OR. L. REV. 1, 3 (1986) (proposing that courts apply the public trust doctrine to “resource management decisions in the EEZ”); Turnipseed et al., *supra* note 13, at 9 (arguing for “an enforceable public trust obligation for the federal government in the management of ocean resources”).

119. See Buzbee, *supra* note 11, at 7 (explaining regulatory opportunity as a commons resource). The author discusses the phenomenon of a regulatory commons as it applies to fish ranching in the EEZ in more detail in Babcock, *Ride ‘Em Charlie Tuna*, *supra* note 10, at 68–71, than here, but the concept’s importance to an understanding of the benefits of applying the public trust doctrine to the EEZ warrants some repetition of that discussion later in this part of the Essay.

120. See Buzbee, *supra* note 11, at 8.

Complex legal systems contain dynamics that encourage the creation of regulatory gaps.¹²¹ Regulatory gaps are created by having more than one potential regulatory authority with jurisdiction over “[a] regulatory opportunity” when the regulators’ jurisdictions and the harmful activities’ causes and effects are noncommensurate.¹²² These regulatory gaps provide the conditions for the creation of a regulatory commons.¹²³ Professor Buzbee, who describes the phenomenon and negative consequences of regulatory commons in his article *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, posits that the dynamics of regulatory commons make it unlikely that regulators will end them by filling the gaps with positive law.¹²⁴ One reason for regulatory intransigence is that most regulators and the industries they regulate find it to be in their mutual self-interest to preserve the status quo.¹²⁵ This leaves some social ills—in this case, the despoliation of a communal natural resource—either incompletely or ineffectually regulated or not regulated at all.¹²⁶

The EEZ typifies a regulatory commons because there is no primary regulatory agency with the mandate to protect marine resources on the EEZ from environmental harms,¹²⁷ let alone one agency with any reason to assume that mantle.¹²⁸ There is also a regulatory commons on the EEZ because no single institution or regulatory mechanism has the authority to address harms that extend beyond their jurisdictional boundaries, creating a political–legal

121. *Id.* at 6.

122. *Id.* at 5–6.

123. *Id.* at 13 (“[T]he underlying social ill . . . lacks a matching political–legal regime.”).

124. *See id.* at 14. *But see* William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 122–26 (2005) (noting that the benefits of regulatory overlap and interaction include reducing the “risk of the regulatory commons problem of inattention or inaction” and providing a valuable antidote to inaction incentives).

125. *See* Buzbee, *supra* note 11, at 36 (explaining that regulators and those who benefit from the status quo have little incentive to change); *id.* at 37 (stating that the dynamics of a regulatory commons “create logical incentives for lack of political investment in regulatory solutions”).

126. *See id.* at 5.

127. The EEZ is divided into distinct jurisdictional zones. The states have jurisdiction over waters and title to lands beneath those waters three miles off their shores. 43 U.S.C. § 1311(a) (2006). This jurisdiction is subject to the federal government’s paramount right to regulate those waters and lands for “commerce, navigation, national defense, and international affairs.” *United States v. Louisiana*, 363 U.S. 1, 10 (1960). The federal government has complete sovereignty over the waters, seabed, and subsoil within its twelve-mile territorial sea, *see* Proclamation No. 5928, 3 C.F.R. 547 (1988), *reprinted in* 43 U.S.C. § 1331 (2006), and sovereign authority stretching outwards another 188 nautical miles over the EEZ, *see* Proclamation No. 5030, 3 C.F.R. 23 (1983), *reprinted in* 16 U.S.C. § 1453 (2006). The United States’ EEZ is the largest in the world, totaling over 2.2 million nautical miles. Richard G. Hildreth, *Place-Based Ocean Management: Emerging U.S. Law and Practice*, 51 OCEAN & COASTAL MGMT. 659, 659 (2008).

128. *See* Buzbee, *supra* note 11, at 9 (observing that the absence of a primary regulator means that no one is responsible for “transboundary or ecosystem aquaculture risks” and that there is not a single entity likely to be held responsible for harms that might arise).

mismatch between the jurisdictional reach of potential regulators and the area where potential harmful activities may occur.¹²⁹

While plummeting stocks of wild fish on the EEZ have created a crisis that may eventually trigger sufficient political attention to the problems causing the plunge, which could eventually lead to positive law filling the current regulatory gap, the problems may be too dispersed and distant to trigger that type of reaction. The situation will not cure itself unless the dynamics that created it are changed. Thus, it seems unlikely that the EEZ will soon emerge from its unregulated state and that the regulatory commons will end without some intervention, such as the application of the public trust doctrine.¹³⁰

The situation on the EEZ presents a classic regulatory gap that the public trust doctrine has traditionally filled to protect communal natural resources and to avoid the resultant social ills that come from the resources being unprotected. The doctrine offers normative standards and management tools, like balancing tests and accounting, that can assist in the management of these resources until the legislature enacts positive laws to displace it. The use of the doctrine may also act as an incentive for the enactment of positive law where none exists because its use will disrupt the dynamic in favor of maintaining the status quo. And the use of the public trust doctrine could end the dysfunctional regulatory commons on the EEZ because it fills the regulatory gap until institutional arrangements among overlapping regulatory authorities can be sorted out and positive law enacted.

Professor Huffman would protest that law should not allow this extension of the public trust doctrine because the doctrine is a harmful fiction. However, this fiction is a good legal fiction, and if the law can provide a legal basis for allowing the public trust doctrine's extension offshore of the continental United States, then it should be extended to where it can do great good.

V. CONCLUSION

The public trust doctrine exhibits all the stability of a doctrine that has been applied successfully through the centuries to protect important communal natural

129. See *id.* at 25 (noting the mismatch between the size of the regulatory authority and the underlying resource); Kristen M. Fletcher, *Regional Ocean Governance: The Role of the Public Trust Doctrine*, 16 DUKE ENVTL. L. & POL'Y F. 187, 191 (2006) (noting that this overlapping, sometimes conflicting, legal regime has created barriers to approaching ocean resources from an ecosystem basis because jurisdictional boundaries were drawn in a way that was oblivious to the natural boundaries of given ecosystems).

130. Recognizing the existence of a regulatory gap on the EEZ, the National Oceanic and Atmospheric Administration recently justified its decision to approve an application for deepwater aquaculture in the Gulf of Mexico by explaining that rejecting it on the ground that the agency lacked authority to act "would have created an 'unacceptable regulatory gap,' in which no agency would have authority over the environmental and fishery concerns for aquaculture." Allison Winter, *Lawsuit Aims to Block Deepwater Aquaculture in Gulf of Mexico*, GREENWIRE, Oct. 5, 2009, <http://www.cenews.net/Greenwire/print/2009/10/05/5>.

resources from destruction. Professor Huffman's complaint that the doctrine's shaky provenance should cause courts to pause when asked by advocates to extend the doctrine further to reach unprotected communal resources is misguided. His advice that advocates of the doctrine should "search for constitutional sources" for it or "make the case for judicial lawmaking beyond the traditional judicial role of legal interpretation"¹³¹ seems tongue-in-check at best. He does not explain how resources currently outside the regulatory pale are to be protected in the absence of the public trust doctrine.¹³² As the EEZ illustrates, to leave resources unprotected until positive law fills the gap puts them at the mercy of the regulatory commons, where regulatory inertia militates against gap filling by positive law.

The public trust doctrine offers a way to fill regulatory gaps with normative standards and various resource management tools like public interest balancing, comprehensive planning, and natural resource accounting. Indeed, applying the doctrine in certain situations, like those occurring on the EEZ, may actually spur the creation of positive law and end the paralyzing inertia of a regulatory commons. Thus, even if the public trust doctrine is a legal fiction, as Professor Huffman contends, it is a good one. It performs an important rhetorical purpose to the extent that it gives judicial voice to values that are embedded in communal property. Because the doctrine works, in the sense that its use fills a social need, it has woven itself into property law with the result that its disappearance could well destabilize people's expectations about their rights in certain types of property. To quibble over the accuracy of its origins seems to miss the point, and to use that plaint to suggest that the doctrine should not be extended to protect vulnerable natural resources of communal value is nothing short of foolhardy.

131. Huffman, *Inconvenient Truths*, *supra* note 1, at 103.

132. The closest Professor Huffman gets to proposing an alternative regimen to the public trust doctrine is an oblique reference to Professor Lloyd Cohen's suggestion that "history will demonstrate that the common rights generally said to be the core of the public trust doctrine originally existed to promote commercial interests through the efficiencies of private rights." *Id.* at 102 (citing Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 254 (1992)).